IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

v.

NICK BOUGAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF FOR THE PETITIONER

DANIEL B. HODGSON
WILLIAM C. HUMPHREYS, JR.
PETER Q. BASSETT
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
35 Broad Street, N. W.
Atlanta, Georgia 30303
(404) 588-0300
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Table of Authorities

Cases

Acts and Statutes

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

v.

NICK BOUGAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Georgia Court of Appeals (App. A-1—A-4)* is reported in 138 Ga. App. 706, 227 S.E.2d 434 (1976). The order of the State Court of DeKalb County (App. A-5), the judgment of the Court of Appeals (App. A-6) and the orders denying rehearing, petition for certiorari and reconsideration (App. A-7—A-9) are unreported.

* Citations to the Petition Appendix and to the Single Appendix are denoted as "App. . . ." and "A. . . .", respectively.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on May 6, 1976 (App. A-6), affirming the order of the State Court of DeKalb County dated August 22, 1975. App. A-5. The Court of Appeals denied a timely motion for rehearing on May 21, 1976. App. A-7. Thereafter, on June 30, 1976, the Georgia Supreme Court denied a duly filed petition for certiorari, one Justice dissenting (App. A-8); a motion for reconsideration was finally denied by the Supreme Court on July 15, 1975, two Justices dissenting. App. A-9. The Petition for Writ of Certiorari was filed on September 15, 1976, and was granted on January 25, 1977. — U.S. —, 45 U.S.L.W. 3508. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970).

QUESTION PRESENTED

Whether 12 U.S.C. § 94 requires that transitory[1] actions in state courts against national banking associations conducting business in more than one county must be maintained, for venue purposes, only in the association's home county designated in its federal charter certificate?[2]

STATUTE INVOLVED

Rev. Stat. § 5198 (1878), 12 U.S.C. § 94 (1970) provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court

[1] The "local action" exception to 12 U.S.C. §94 is discussed n. 33, *infra*.

[2] The record herein comprises, *inter alia*, a true copy of Petitioner's charter certificate (A. 12-13) duly issued under seal of the Comptroller of the Currency. *See* 12 U.S.C. §27 (1970).

> of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATEMENT OF THE CASE

This case, involving a suit for alleged unlawful redemption and conversion of a particular savings bond (A. 4-6), was filed in the State Court of DeKalb County, Georgia, on June 30, 1975, by Nick Bougas (hereinafter "Bougas") against The Citizens and Southern National Bank (hereinafter "C&S"), a national banking association chartered in Chatham County, Georgia, under the laws of the United States. On July 29, 1975, C&S duly answered (A. 7-8) and concurrently filed a motion to dismiss the complaint, with supporting documentation, showing as grounds therefor that 12 U.S.C. § 94 lays exclusive venue, in transitory actions against a national banking association, in its home county which, for C&S, is Chatham County, Georgia. A. 9-13. On August 22, 1975, the C&S motion to dismiss was denied without discussion of the 12 U.S.C. § 94 privilege. App. A-5.

On appeal to the Georgia Court of Appeals[3] C&S reiterated the 12 U.S.C. § 94 mandate restricting venue, in transitory suits against a national bank, to the bank's home county as specified in its charter certificate.[4] In its decision of May 6, 1976, the

[3] C&S perfected its interlocutory appeal under Ga. Code Ann. §6-701(a)2(A) by duly obtaining a certificate for immediate review from the trial court (R. 18) and an order from the Court of Appeals granting interlocutory appeal (R. 19); the requisite notice of appeal was timely filed in the State Court of DeKalb County on October 1, 1975. R. 1-2.

[4] The C&S arguments are set forth in the "Brief of Appellant," which is included in the certified record herein but is not separately paginated as part of the record.

Court of Appeals recognized both the applicability of 12 U.S.C. § 94 to C&S as an "association under this chapter" (App. A-2) and that 12 U.S.C. § 94 posits mandatory venue in suits against national banking associations. App. A-2. Furthermore, the Court of Appeals implicitly acknowledged that C&S is "established," within the meaning of 12 U.S.C. § 94, only in that federal district encompassing Chatham County, the home county and principal place of business specified in its charter certificate, and *not* in whatever district it may conduct business. App. A-1, 2, 3, 4; *see* A. 11-13.

However, although cognizant of the significant federal and state authority postulating that "established" and "located" in 12 U.S.C. § 94 are functionally synonymous words designating a single federal district and state county, respectively, in which transitory actions against national banks can be prosecuted (*see* App. A-3), the Court of Appeals perceived a semantical distinction between these two words:

> "Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the banks must be *established* in the district) and suits brought in state courts (where the bank need only be *located* in the county or city of the court having similar jurisdiction in similar cases). Otherwise, Congress hardly would have substituted 'located' for 'established' in defining venue of a suit brought in state court." (App. A-3).

On the basis of this dichotomy, the Court of Appeals held:

> "We conclude that when a national bank, 'established' in this state, operates and maintains in counties other than the county of its principal office, branches at which it conducts its general banking business, the corporation is present at all times [in] each such branch and is 'located' therein within the meaning of this Act of Congress. Thus, it is subject to suit in a state court in such county, otherwise having jurisdiction, just as it is in the county wherein its principal office is located." App. A-4.

The C&S motion for rehearing in the Court of Appeals,[5] and the petition for certiorari and motion for reconsideration in the Georgia Supreme Court, were substantially based upon the erroneous interpretation of 12 U.S.C. § 94 by the Court of Appeals and were denied without opinion. App. A-7—A-9.

SUMMARY OF ARGUMENT

Although all lower federal courts and certain state courts are in accord that a national bank is "established" and "located" under 12 U.S.C. § 94 only in that federal district and state county, respectively, in which its charter was issued, other state courts have sanctioned venue in suits against a national bank in any county wherein it maintains branch banks as well as in the charter county, either on the theory that the erection of a branch bank "locates" a national bank in that county, or that the establishment of the branch bank constitutes a presumptive pre-litigation waiver of the 12 U.S.C. § 94 venue privilege.

An analysis of the statutory language, congressional purpose and legislative history of 12 U.S.C. § 94 and similar statutes indicates that the words "established" and "located" were used interchangeably in 12 U.S.C. § 94 to designate an exclusive federal district and state county in which transitory actions against a national bank could be prosecuted. Excepting local actions and waiver of the 12 U.S.C. § 94 venue privilege by belated interposition of the defense, this Court has consistently confirmed that 12 U.S.C. § 94 was intended to "locate" a national bank only in its home (charter) county, notwithstanding

---

[5] The filing of a motion for rehearing is a statutory prerequisite to petitioning for certiorari in the Georgia Supreme Court. Ga. Code Ann. §24-4536(h).

the antiquity of the national bank venue statute and ever-evolving policy considerations.

Having concluded that a national bank is only "located" and subject to suit in its home county, the statutory intent of 12 U.S.C. § 94 cannot be vitiated by finding a presumptive prelitigation waiver of venue attributable to the erection of branch banks in other counties.

ARGUMENT

Introduction

This case presents the primary question of where a national bank is "located" within the meaning of 12 U.S.C. § 94[6] for purposes of defending transitory suits in state courts.[7] Secondary, but necessarily concomitant to this question, is the correlative issue of whether the venue provisions of 12 U.S.C. § 94 can be presumptively waived prior to litigation by the conduct

---

[6] "located" is also employed in at least two other statutes dealing with national banks. A proviso was added in 1864 to the predecessor of 12 U.S.C. §94 (13 Stat. 99, 116, as amended, 28 U.S.C. §1394) stipulating that suits against the Comptroller of the Currency "shall be had . . . in the district in which the association is located." *See First National Bank v. Williams*, 252 U.S. 504 (1920) for a history of this particular provision.

The citizenship of a national bank is governed by 28 U.S.C. §1348 (originally enacted in 1882 as 22 Stat. 162, 163) which provides that banks shall be citizens "of the States in which they are respectively located." *See Herrmann v. Edwards*, 238 U.S. 107, 111 (1915) for a history of this provision and *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943) for a judicial interpretation of "located" in this context.

[7] 12 U.S.C. §94 independently regulates venue in the federal courts, providing that suits against national banking associations "may be had in any district or Territorial court of the United States held within the district in which such association may be established . . ." Although several federal courts consider the words "established" and "located" to be functionally interchangeable, the interpretative holdings of such courts, as federal courts, must be restricted to the meaning of the word "established" in 12 U.S.C. §94. *See, e.g., United States National Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973); *Fisher v. First National Bank*, 538 F.2d 1284 (7th Cir. 1976); *McClung v. LaSalle National Bank*, 387 F. Supp. 977 (S.D. Iowa 1975). In recognition of this fact, the Court of Appeals noted:

> "A close examination of the federal cases dealing with the dichotomy of 'established' and 'located' discloses that in each of those cases the federal court was dealing with its own venue, i.e., was the bank established (under its charter) within the

of business or the maintenance of branch banks in several counties.[8]

In terms of legal methodology, the resolution of these questions must be grounded in principles of statutory interpretation. Unfortunately, within recent years, such principles have frequently been subsumed in penumbral policy considerations and artful rhetoric which have become the prevalent modes of circumventing the applicability of 12 U.S.C. § 94. As a result, three diverse interpretative theories predominate in the state courts:

1. Certain courts have held that the words "established" and "located" are functionally synonymous and, following the federal interpretation of "established"[9] have concluded that, absent intentional waiver, transitory suits in state courts can only be brought in the national bank's home county specified in its charter certificate. *Gregor J. Schaefer Sons, Inc. v. Watson*, 26

---

federal court's district. [citation omitted]. None of the cases were dealing with the venue of a suit brought in a state court in a county in which the bank was operating a branch facility but in which it was not 'established.'" App. A-3—A-4.

This truistic analysis is faultless: the lower federal courts and all state courts are inherently precluded from adjudicating venue questions in courts of disparate jurisdictional bases.

[8] The Court of Appeals commented:

"As to whether a national bank is 'located' in a county simply by setting up a branch to conduct general bank business, therein, it seems clear that it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." App. A-4.

Although this observation broaches the issue of waiver, it may erroneously suggest that *this suit* arose out of a C&S branch in DeKalb County, whereas the record shows only that C&S conducts business at a designated place in DeKalb County. A. 7.

[9] The lower federal courts are in unanimous accord that a national bank is "established" only in that federal district encompassing the national bank's home county. *E.g., Leonardi v. Chase National Bank*, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Northside Iron & Metal Co. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973).

A.D.2d 659, 272 N.Y. Supp. 2d 790 (1966); *Prince v. Franklin National Bank*, 62 Misc. 2d 855, 310 N.Y. Supp. 2d 390 (1970); *Ebeling v. Continental Illinois National Bank & Trust Co.*, 272 Cal. App. 2d 724, 77 Cal. Rptr. 612 (1969).

2. The diametrically opposed position espoused by some courts rejects the synonymity of "established" and "located", and concludes that a national bank is "located" in any county in which it operates and maintains branches conducting general banking business, notwithstanding that it may be "established" only in the home county specified in its charter certificate. *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, 281 N.C. 525, 189 S.E.2d 266 (1972); *Holson v. Gosnell*, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied*, 423 U.S. 1048 (1976); *Central Bank v. Superior Court*, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

3. A third theory has emerged which is premised not upon pure analysis of the word "located," but rather upon a notion of "presumptive"[10] waiver. The judicial adherents to this theory, while paying superficial homage to the general principle that a national bank is "located" only in its home county, hypostasize a waiver of 12 U.S.C. § 94 by the creation of a branch bank, concluding therefrom that a national bank can be sued in any county in which it operates a branch bank, at least as to actions arising out of its banking activity at such branch. *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, *cert.*

---

[10] The waiver is "presumptive" because it automatically ensues from the creation of a branch bank without regard to the voluntary intention of the national bank. Thus alienated from the facts of each particular case, the theoretical legitimacy of this type of waiver is actually a question of law subject to review as such on appeal. *See* §D, *infra*.

A variation of this theory postulates a "waiver" of the 12 U.S.C. §94 venue privilege as to actions arising out of any business conducted in the county in which suit is brought, whether or not branch banking is conducted in that county. *E.g., Vann v. First National Bank*, 324 So.2d 94 (Fla. App. 1976).

denied, 393 U.S. 952 (1968); *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra* (alternative holding).[11]

The Court of Appeals' decision falls within the purview of the second theory[12] and is fatally flawed in its analytical base which comprises little more than gossamer speculation in disregard of a cardinal precept of statutory construction:

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by consideration of the words themselves, but by considering, as well, the context, the purposes of law, and the circumstances under which the words were employed." *Puerto Rico v. Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 258 (1937).

Conspicuously absent in the Court of Appeals' decision is not only a fully explicated semantical analysis of the stautory language, but also any apparent concern with the legislative history, context, or congressional purpose of 12 U.S.C. § 94. A proper analysis of these factors compels a finding that C&S is "located" only in Chatham County, Georgia, the home county and principal place of business specified in its charter certificate, and that venue herein does not lie in DeKalb County, Georgia.

---

[11] In the calendar year 1976 alone, several representative samples and permutations of the three theories, emanating from both the federal and state courts, were before this Court for consideration. *Holson v. Gosnell, supra* (interpretation of "located"); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976) ("permissiveness"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) ("implied repealer"); *Chase Manhattan Bank v. Sailboat Apartment Corp.*, 318 So.2d 575 (Fla. App. 1975), *vacated*, 45 U.S.L.W. 3322 (U.S. Nov. 1, 1976) (76-126) ("waiver"); *Cogdell v. Fort Worth National Bank*, 536 S.W.2d 257 (Tex. Civ. App. 1976), *cert. docketed*, 45 U.S.L.W. 3451 (U.S. Dec. 27, 1976) (No. 76-882) ("waiver").

[12] The actual ruling of the Court of Appeals was drawn verbatim from *Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra*, 281 N.C. at 532, 189 S.E.2d at 271. *See* App. A-4.

A. The Statutory Language of 12 U.S.C. § 94 Affirms That a National Bank Is "located" and "established" in Only One Situs.

"The starting point is every case involving construction of a statute is the language itself,"[13] which is the most persuasive evidence of congressional intent. *See Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). However, this principle does not sanction the severance of particular words from the remaining language of a statute for the type of isolated analysis undertaken by the Court of Appeals:

> "Apparently Congress intended a different rule to apply as between suits brought in federal courts (where the bank must be *established* in the district) and suits brought in state courts (where the bank need only be *located* in the county or city of the court having similar jurisdiction in similar cases). Otherwise, Congress hardly would have substituted 'located' for 'established' in defining venue of a suit brought in state court." App. A-3.

Although this reasoning has decisional support[14] it erroneously assumes that since the two words are different, the drafters must have intended that they have dichotomous meanings. In fact, in the realm of statutory construction, "[w]ords generally have different shades of meaning . . . ,"[15] and it is no more the rule that similar but different words must convey completely different thoughts within the context of a statute than it is the rule

---

[13] *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J. concurring).

[14] *See Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., supra*, 281 N.C. at 530, 189 S.E.2d at 266.

[15] *Puerto Rico v. Shell Co. (P.R.) Ltd., supra*, 302 U.S. at 258.

that the same word must always be construed as having the same meaning every place it is used within a statute.[16]

Therefore, it is unavailing to premise the interpretation of "established" and "located" upon the simplistic proposition that since they are different words, they have immutably different meanings which can be ascertained by mere lexical review. The words "established" and "located" are essentially neutral, noncommittal, geographical referents whose synonymity or dichotomy within 12 U.S.C. § 94 can only be discerned from their placement within and interrelationship with the remaining statutory language.

Thus, a more plausible explanation of the prima facie meaning of "established" and "located" in 12 U.S.C. § 94 is achieved if the analytical focal point is shifted from these words to the article "the" and the adjective "any" which clearly appear contradistinctively within the statute:

> "Actions and proceedings against *any* association under this chapter may be had in *any* district or Territorial court of the United States held within *the* district in which such association may be established, or in *any* State, county, or municipal court in *the* county or city in which said association is located having jurisdiction in similar cases." (Emphasis added)

The adjective "any" is used throughout 12 U.S.C. § 94 to suggest a potential plurality, whether of entities[17] or of courts,[18]

---

[16] As noted by this Court in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932):

> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance."

[17] *viz.* "any association."

[18] *viz.* ". . . any district or territorial court," ". . . any state, county, or municipal court."

whereas the article "the" modifies nouns which are both in the singular[19] and denotative of a unique geographical situs.[20]

From the foregoing semantical and grammatical construction of 12 U.S.C. § 94, the conclusion can be drawn that had Congress intended to prescribe a plurality of districts, counties or cities in which a national bank could be "established" or "located," it would have substituted the adjective "any" for the article "the" as the modifier of "district" and "county or city"; or, at the very least, it would have employed plural nouns (*viz.* "districts," "counties or cities") in lieu of the singular. Instead, Congress envisioned federal suits being maintained only in *the* [one] district in which the association was established and state suits only in *the* [one] county or city in which it was located. The suit could be in *any* court within the city or county but not in *any* city or county.

C&S does not contend that the statutory language of 12 U.S.C. §94 alone preemptively validates its interpretative thesis; suffice it to say that the semantical analysis undertaken by the Court of Appeals is ill-suited to the statutory language which, at least on its face, appears to "locate" a national bank in only one county and city.

B. The Legislative History of 12 U.S.C. §94 Substantiates That a National Bank Is "located" Only in Its Home County.

As previously noted[21] the Court of Appeals completely overlooked the legislative history of 12 U.S.C. §94, with the exception of a casual notation that:

> "The original National Banking Act of 1863 did not

---

[19] *viz.* "the district", "the county or city."

[20] The contrast between the usage of "any" and "the" is accentuated by the fact that the general reference to a plurality of judicial forums (*see* n. 18) consistently precedes, and is restricted by a specific geographical designation encompassing such forums. *See* n. 19.

[21] *See*, p. 10, *supra*.

make mention of suits against national banks in state courts. The provisions of the Act relating to suits in state courts were placed in the statute by later legislation." App. A-3.

Admittedly, the 1863 Act,[22] whether deliberately or by oversight, did not contain any provisions permitting suits against national banks in the state courts. Such suits were first authorized by Section 57 of the National Bank Act of 1864,[23] in the state, county and municipal courts where a national bank is "located." In interpreting that crucial word it should be remembered that Section 57 was not a schematically independent statute; rather it must be reconciled with the remainder of that Act. It is thus noteworthy that Section 6 of the 1864 Act required that a national bank's organization certificate designate the state, territory, or district and *the particular county* in which it operated.[24] Similarly, Section 8 of the Act additionally stipulated that a national bank's "usual business shall be transacted at an office or banking house located in *the place* specified in its organization certificate."[25] (emphasis added).

The upshot of these sections is that at the time Section 57 of the National Bank Act of 1864 was enacted, the activities of national banking associations were restricted by Sections 6 and 8 of the Act to *one* particular location. Not until the enactment of the McFadden Act of 1927[26] were national banks even

---

[22] Act of February 25, 1863, ch. 58, 12 Stat. 665.

[23] Act of June 3, 1864, ch. 106, §57, 13 Stat. 99, 116-17, *as amended*, 12 U.S.C. §94 (1970).

[24] 13 Stat. 101 (1864), *as amended*, 12 U.S.C. §22 (1970).

[25] 13 Stat. 102 (1864), *as amended*, 12 U.S.C. §81 (1970).

[26] Act of February 25, 1977, ch. 191 §7, 44 Stat. 1228, *as amended*, 12 U.S.C. §36 (1970).

permitted to establish branches within their charter locations, and not until 1933 did Congress sanction national bank branches beyond the charter location.[27]

Because of the fact that in 1864 a national bank was permitted only one "location," namely the single place specified in its organization certificate, there is no statutory basis for interpreting the word "located" as having multi-county reference. The Court of Appeals' hypothesis that Congress deliberately chose that word to permit suits against national banks in any county in which they conducted branch banking can only be based upon the indefensible presumption that the Congress anticipated by some sixty years the advent of multi-county branch banking and formulated its statutory language accordingly.[28]

---

[27] Act of June 16, 1933, ch. 89, §23, 48 Stat. 189-190, *as amended*, 12 U.S.C. §36 (1970).

[28] An alternative argument, overlooked by the Court of Appeals, which purportedly justifies a multi-county interpretation of "located" based upon legislative history, was succinctly formulated in *Central Bank v. Superior Court*, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973). The argument derives from certain statutory modifications to [the predecessor of] 12 U.S.C. §§36 and 81, wrought by the McFadden Act (*see* n. 26, *supra*) which first sanctioned national bank branching and enlarged the "place of business" proviso of Section 8 of the 1864 National Bank Act (*see* n. 25, *supra*) to include bank branches as well as the original situs specified in the organization certificate. From these amendments, *Central Bank* concludes that, notwithstanding its phraseology, 12 U.S.C. §94 was intended to lay venue wherever the bank's "general business" was conducted, which by statutory extension, presently includes counties and districts encompassing branch banks.

Pretermitting the obvious strain on the statutory language (§A *supra*), this argument ignores the congressional emphasis upon the principal place of business specified in the *organization certificate* which, even under 12 U.S.C. §81, is geographically distinguished from legitimate branches maintained under 12 U.S.C. §36. Moreover, *Central Bank* neglects to consider that the McFadden Act modifications do not extend implicitly or explicitly to 12 U.S.C. §94. Thus:

> "The further argument that Congress did not intend to prohibit suit in the district where the branch bank was located, since such

C. **Prior Decisions of This Court Indicate That a National Bank Is "located" Only in Its Home County.**

The proposition that a national bank is "located" in all counties wherein it operates and maintains branches conducting general bank business is not only offensive to the purpose and legislative history of 12 U.S.C. §94,[29] but it also contravenes prior decisions of this Court. The most expansive of such decisions is the recent and oft-cited *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963). In *Langdeau*, two national banks chartered in Dallas County, Texas, were sued in Travis County in accordance with lenient state venue provisions. The Texas Supreme Court rejected those banks' 12 U.S.C. §94 defense on the alternative grounds that 12 U.S.C. §94 was "permissive" or that it had been impliedly repealed.[30] Reversing the Texas Supreme Court, this Court held that 12 U.S.C. §94 "must be given a mandatory reading," 371 U.S. at 562, and is

---

branches were not authorized when the predecessor statutes to 12 U.S.C. §94 were passed, is fully answered by the failure of Congress, in the years since such branches were authorized to amend the venue provisions of the National Bank Act to enlarge them accordingly." *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699, 703 n.4 (S.D. N.Y. 1966).

Finally, since the enactment of the McFadden Act, Congress can scarcely have overlooked the judicial disharmony engendered by 12 U.S.C. §94 as well as other provisions of Title 12; indeed, as recently as 1959, Congress overhauled the national bank statutes by legislation which was prefaced by the following:

> An Act to amend the national banking laws to *clarify or eliminate ambiguities, to repeal certain laws which have become obsolete*, and for other purposes. Act of Sept. 8, 1959, Pub. L. No. 86-230, 73 Stat. 457 (emphasis added).

Since this legislative enactment did not modify the provisions of 12 U.S.C. §94, a logical inference can be drawn that the traditionally restrictive interpretation of 12 U.S.C. §94 remains viable.

[29] Discussed §B, *supra*.

[30] *Langdeau v. Republic National Bank*, 161 Tex. 349, 341 S.W. 2d 161 (1960), *rev'd sub nom. Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

"fully effective and must be recognized when [it is] duly raised." *Id.*, at 567. In rejecting the argument that 12 U.S.C. §94 was "permissive," the Court noted:

> "We would not lightly conclude that a congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 and its predecessors. [citations omitted] Appellee, however, would have us hold that any state court could entertain a suit against a national bank so long as state jurisdictional and venue requirements were otherwise satisfied. *Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county.* This we are unwilling to do, particularly in light of the history of § 57 . . . .
>
> All of the cases in this Court which have touched upon the issue here are in accord with our conclusion that national banks may be sued only in those state courts in *the* county where the banks are located." *Id.*, at 560-561 (emphasis added).

Langdeau evidences this Court's continuing affirmation that the word "located" in 12 U.S.C. §94 designates *the* county of suit as *the home county*. *See, First National Bank v. Morgan*, 132 U.S. 141 (1889). The phrase "home county" can have no other referent than the county specified in the bank's charter certificate; this fact implicitly entails the conclusion that a national bank cannot also be sued in any county wherein it operates branch banks. The *Langdeau* opinion, having issued some thirty years after the initiation of multi-county national bank branching[31] cannot be facilely dismissed as quaint 19th century obsolescence.[32]

---

[31] *See* n. 26, *supra*.

[32] A common attack on the restrictive interpretation of 12 U.S.C. §94 is based upon the antiquity and alleged irrelevance of that statute in the twentieth century. *See, e.g., Holson v. Gosnell*, *supra*, 264 S.C. at 620, 216 S.E.2d at 540.

While there are two commonly acknowledged limitations on the scope of 12 U.S.C. §94, neither is relevant to the present case.[33] Furthermore, this Court has never countenanced interference with 12 U.S.C. §94 for any state "policy" reasons; it is solely "[t]he right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to state control. . . ." *Van Reed v. People's National Bank*, 198 U.S. 554, 557 (1905). This congressional prerogative precludes, as a method of statutory construction, the Court of Appeals' effort to interpret 12 U.S.C. §94 "in harmony with the laws of venue of this state." App. A-4. *Van Reed* implicitly postulates, as a matter of basic federalism, that the harmony of federal and state statutes encompassing similar subject matter is irrelevant and that the state judiciary is neither empowered to arbitrate disparities between such statutes according to their

[33] The first limitation, restricting the applicability of 12 U.S.C. §94 to transitory actions, was initially validated in *Casey v. Adams*, 102 U.S. 66, 68 (1880) where the Court noted:

> "Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated. To give the act [the predecessor to 12 U.S.C. §94] of Congress the construction now contended for would be in effect to declare that a national bank *could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located.*" (partial emphasis added).

The *Casey* exception is nothing more than a logical incident of 12 U.S.C. §94: having specifically enacted a statute authorizing suits against national banking associations in both federal and state courts, Congress could hardly have intended its venue provision to completely preclude certain suits altogether. However meritorious or justifiable the *Casey* exception may be, it is immaterial to the resolution of this case; the Court of Appeals did not deem it necessary to consider how an action for conversion can remotely qualify as a "local" action.

The second limitation is not strictly an exception to the applicability or scope of 12 U.S.C. §94, but merely an exposition of the well-settled principle that 12 U.S.C. §94 venue, being a privilege, can be voluntarily waived if not timely raised as a defense. *First National Bank v. Morgan, supra.* Pre-litigation "presumptive" waiver by the maintenance of branch banks is discussed in §D, *infra.*

supposed relative merits, nor authorized to reformulate federal statutes in accordance with its own normative philosophy; "such a situation is a matter for Congress to consider." *Mercantile National Bank v. Langdeau, supra*, 371 U.S. at 563.

In short, this Court has consistently respected the restricted venue of 12 U.S.C. § 94, and has never sanctioned efforts to limit its effect for reasons of inconvenience to non-national bank litigants or for any other putatively desirable purposes. *See, Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963); *Cope v. Anderson*, 331 U.S. 461 (1947).[34]

D. The Maintenance of Branch Banks Does Not Constitute a Waiver of 12 U.S.C. § 94.

The traditional concept of waiver, replete with manifold factual variations, is not before the Court in this case.[35] However, the concept of "presumptive" waiver[36] is an issue which is necessarily concomitant to the interpretation of "located" and must be resolved in order to preserve the efficacy of the Court's decision.

The courts have historically acknowledged that provisions of 12 U.S.C. § 94 afford a venue privilege which can be waived under certain circumstances[37] on the following theory:

> "Waiver is a voluntary and intentional relinquishment or

[34] As Mr. Justice Black stated in *Cope*, 331 U.S. at 467:

> "For jurisdictional purposes, a national bank is a 'citizen' of the state in which it is established or located, 28 U.S.C. §41(16), [current version at 28 U.S.C. §1348], and *in that district alone can it be sued*. 12 U.S.C. §94." (emphasis added).

[35] *See*, n. 8, *supra.*

[36] Discussed pp. 9-10, *supra.*

[37] *See, e.g., First National Bank v. Morgan*, 132 U.S. 141 (1889); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. [citation omitted]. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." *Bufjam v. Chase National Bank*, 192 F.2d 58, 60-61 (7th Cir. 1951).

C&S has not "formally" waived its venue rights under 12 U.S.C. § 94 either by contract[38] or by appointment of a statutory agent for service of process.[39] Moreover, the record only substantiates that C&S maintains a place of business in DeKalb County (A. 7); a tenuous basis, at best, for invoking implied pre-litigation[40] waiver, the necessary elements of which have never been adequately determined, notwithstanding numerous decisions of this Court[41] which have been liberally cited as judicial precedent for all manner of waiver theories.

---

[38] In *Michigan National Bank v. Robertson, supra*, 372 U.S. at 594, this Court intimated, but did not decide, that venue under 12 U.S.C. §94 may be waived by anticipatory contractual stipulation.

[39] *See* n. 41, *infra*.

[40] It has long been established that the venue provisions of 12 U.S.C. §94 can be waived ". . . by appearing [in an action] and making defense without claiming the immunity granted by Congress." *First National Bank v. Morgan, supra*, 132 U.S. at 145.

[41] 12 U.S.C. §94 waiver has been a subliminal issue, beyond the compass of actual decision, in various cases before this Court. *See, e.g., Michigan National Bank v. Robertson*, 372 U.S. 591 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, 425 U.S. 460 (1976); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

The advent of "presumptive" waiver signalled the demise of even token consideration of the crucial factors of "consent" and "voluntary relinquishment," in lieu of which was substituted a solitary and conclusive presumption:

> "If a national bank avails itself of a jurisdiction by setting up a branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." *Lapinsohn v. Lewis Charles, Inc., supra*, 212 Pa. Super. at 193, 240 A.2d at 94-95.

Lapinsohn and its proponents[42] have compressed the multiple issues of waiver into a simplistic theory whose primary component is the physical emplacement of a branch bank. Care-

The decisional basis of several lower federal and state court cases finding "waiver" of 12 U.S.C. § 94, has frequently been *Neirbo Co. v. Bethlehem Ship Building Corp., Ltd.*, 308 U.S. 165 (1939), allegedly the definitive authority on waiver questions. *See Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, *cert. denied* 393 U.S. 952 (1968); *Reaves v. Bank of America*, 352 F. Supp. 745 (S.D. Cal. 1973). In fact, *Neirbo* adjudicated certain waiver questions appertaining to 28 U.S.C. §112, the then-existing general federal venue statute, and held that the right of a corporation to be sued in the district of its residence could be waived by the consensual appointment of an agent for service of process in a foreign state. The limitations of *Neirbo* were noted in *Olberding v. Illinois Central Railroad Co., Inc.*, 346 U.S. 338 (1953), an action for intrastate damages caused by a non-resident motorist, where the Court held that the non-resident did not waive his venue rights under 28 U.S.C. §1391(a) by availing himself of the foreign state's highways in the absence of any *Neirbo*-type appointment of agent for service of process.

[42] *E.g., Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co.*, 281 N.C. 525, 189 S.E.2d 266 (1972); *Frankford Supply Co. v. Matteo*, 305 F. Supp. 794 (E.D. Pa. 1969); App. A-4.

fully worded,[43] and disguised in terms of manifestation of "intent", presumptive waiver is, in actuality, nothing more than a subtle method of infusing the erection of a branch bank with deleterious consequences prohibited by the language, history and purpose of 12 U.S.C. § 94. If the erection and maintenance of a branch bank in another county do not "locate" the national bank in that county under 12 U.S.C. § 94, it is a mere charade to propose that the erection of that same branch bank nullifies venue rights under 12 U.S.C. § 94 altogether; "[s]uch a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county." *Mercantile National Bank v. Langdeau, supra,* 371 U.S. at 560.

---

[43] The *Lapinsohn* argument is understandably phrased in terms of "setting up a branch" and "general banking business". However, even its marginal pretense to theoretical legitimacy would be dissipated, if *Lapinsohn* is construed as suggesting that waiver of venue by the transaction of business is a legal postulate peculiar to national banks. Assuming that it is not, there seems to be no reason why the *Lapinsohn* theory cannot be extended, in derogation of most state venue statutes (*e.g.*, Ga. Code Ann. §3-201), to ensnare any individual conducting general business without the county of his residence, although such a proposition would likely be judicial anathema.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Georgia Court of Appeals should be reversed with instructions that the Court of Appeals direct the trial court to enter an order dismissing the Complaint.

Respectfully submitted,

DANIEL B. HODGSON

WILLIAM C. HUMPHREYS, JR.

PETER Q. BASSETT
ALSTON, MILLER & GAINES
1200 Citizens and Southern National
Bank Building
35 Broad Street
Atlanta, Georgia 30303
(404) 588-0300
Counsel for Petitioner